

SEP 14 1983

ALEXANDER L. STEVAS,  
CLERK

No. 83-248

**In the  
Supreme Court of the United States**

OCTOBER TERM, 1983

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.,  
PETITIONER,

v.

JAY EDWARDS, INC.,  
RESPONDENT.

**BRIEF OF RESPONDENT IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT**

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### Counter-Statement of the Question Presented

The petitioner's statement of the question presented attempts to create a new legal theory where none existed before. The Court of Appeals below simply decided that upon a review of all the evidence, most of it unobjected to by petitioner, the jury's award of damages for the years petitioner was a supplier of respondent was supported by the evidence. Now petitioner attempts to construe that holding as one in which the Court of Appeals ruled that a failure to object to the admission of evidence of damage at trial bars an appellate review of the sufficiency of the evidence of damage supporting an award. That was not the issue below nor is it here. Indeed the proper statement of the issue here is:

1. Should this Court grant a petition for a writ of certiorari in a case where the motion for a new trial did not challenge the sufficiency of the evidence supporting the verdict and in which both the trial court and the Court of Appeals determined there was sufficient evidence to support a jury verdict?

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Respondent Jay Edwards, Inc. ("Edwards") submits this opposition to the Petition of New England Toyota Distributor, Inc. ("NET") for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit issued May 19, 1983.

**Counter-Statement of the Case**

- A. NET FAILED TO FILE A TIMELY MOTION FOR A NEW TRIAL ON THE ISSUE OF WHETHER THE WEIGHT OF THE EVIDENCE SUPPORTED THE DAMAGE AWARD.

With one exception, Edwards has no quarrel with NET's description of the proceedings below which is found at pages 3 and 4 of its Petition. The exception is NET's claim, on the bot-

tom of page 3, that it "filed a timely motion for a new trial on the ground, *inter alia*, that plaintiff's damage theory was irrational and speculative." A copy of that motion is included as Appendix A attached hereto. In truth, NET's motion was based upon five grounds, not one of which dealt with damages awarded for the period when NET was Edwards' supplier of cars, which award was upheld below. The first ground related to the assessment of damages for the period *after* NET was no longer the supplier. The last four grounds involved evidentiary questions pertaining primarily to the issue of liability. Since the portion of the damage award upheld by the Court of Appeals below was only for the time period when NET *was* Edwards' supplier, the motion for a new trial is clearly irrelevant to this Petition. Not until it filed its memorandum in support of its motion for a new trial, did NET raise the issue of the sufficiency of the evidence supporting the award. However, that memorandum was not filed until May 13, 1982, or some 21 days after the judgment was entered. Even if the memorandum can be considered a motion for a new trial, which it cannot, it is clear that NET failed to make a timely motion challenging the weight of the evidence supporting the award of damages for the period when it was the distributor because Fed.R.Civ.P. 59 (b) requires such a motion to be made within ten days of the entry of judgment. Therefore, the basis for NET's Petition is procedurally defective and for that reason alone, the Petition should be rejected.<sup>1</sup>

### Counter-Statement of the Facts

Edwards is presently the Toyota dealer in Portsmouth, New Hampshire, and has been since 1973. From 1973 until March 8, 1978, NET was the regional distributor of Toyotas for New England and was Edwards' sole supplier of cars.

<sup>1</sup> Edwards never raised this point below because NET appealed from the judgment below, which appeal included the issue of sufficiency of the evidence. See Defendant's Notice of Appeal attached hereto as Appendix B.

Edwards claimed, and proved, that NET engaged in various bad faith acts against Edwards because Edwards helped form and then lead a group of dealers protesting NET's practices. The bad faith acts NET committed included, among others, the initiation of a baseless investigation of Edwards by the New Hampshire Attorney General's office, an attempted termination of Edwards's Toyota franchise and an intentional, discriminatory reduction in the number of cars allocated by NET to Edwards. The reduction in allocation was proven almost entirely by use of NET's own documents and it formed the basis of Edwards' damage claim.

NET allocated the cars it distributed to dealers according to a formula which took into account the sales history of a dealer for the prior 60 or 90 days and the amount of inventory the dealer had on hand. The purpose of the formula was to give each dealer an equal days supply of cars to sell given each dealer's sales record in the past 60 or 90 days. Edwards proved that it and a neighboring dealer had almost equal sales and identical allocations for the three months prior to the beginning of the discriminatory allocations in April of 1976. In all allocations after April 1, 1976, Edwards was denied cars offered the other dealer. The result was that Edwards was allocated 527 cars less than it should have been during the period April, 1976, to December, 1977, or some 25 cars a month.<sup>2</sup> For the period April, 1976, until NET stopped being the distributor in March of 1978, Edwards calculated it should have been offered an additional 25 cars a month, or 300 cars per year. Then, Edwards applied its acceptance rate, i.e., that percentage which reflected the number of cars Edwards actually accepted each year of those cars actually offered to it.

Having determined how many cars it would have taken had it been offered the additional cars it deserved, Edwards then reviewed its actual income and expenses to determine what

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<sup>2</sup> No allocation records exist for the periods prior to January, 1976 or after December, 1977.

additional net profits it would have earned. The calculations were done by Jay Edwards, president of Edwards, who had over 20 years experience in the automobile business, including 10 years as president of Edwards. Edwards' accountant, Cushman Colby, who had over 30 years experience as an accountant for car dealerships, reviewed both the calculations and the assumptions regarding increases in revenue and expenses and concurred in their accuracy. Both men testified at length on the issue of damages and were sufficiently persuasive to the jury and the trial judge as well as the Court of Appeals.

In contrast to Edwards' carefully prepared report presented by two experts, NET presented no contradictory evidence. No expert was offered by NET to challenge either the assumptions in the damage report or the method of calculation. No comparisons to other dealers or industry averages were ever introduced by NET. NET merely cross-examined Edwards' experts making some of the same points it does here. In fact, NET never objected to either the report or the experts' testimony. Yet, NET now claims the damage report and other evidence presented by Edwards is not of sufficient weight to support the jury award. A simple reading of the opinion of the Court of Appeals herein demonstrates why NET's arguments are without merit.

The entire thrust of NET's claim herein is that the evidence submitted by Edwards without objection from NET is of insufficient weight to support the jury verdict. After noting in footnote 6 at page 9a (Pet. App. 9a)<sup>3</sup> of the opinion that Edwards' president was qualified to give expert testimony on damages and such testimony alone would support a verdict, the Court of Appeals held that where both testimony and calculations are admitted without objection, the weight to be given such evidence is for the trier of fact. NET's remedy, as the court pointed out at pages 6a and 10a (Pet. App. 6a, 10a), was to cross-examine vigorously, present its own experts and

<sup>3</sup> All references marked Pet. App. refer to Petitioner's Appendix page numbers.

evidence, and, most importantly, object to Edwards' exhibits and testimony at trial as being inaccurate. As described before, NET did nothing except cross-examine Edwards' experts. Therefore it cannot now be heard to claim there is insufficient evidence to support an adverse result.

### **Reasons for Not Granting the Writ**

#### **I. NET FAILED TO MAKE A TIMELY MOTION FOR A NEW TRIAL UNDER RULE 59(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.**

The verdict was returned on April 21, 1982, and judgment was entered on April 22, 1982. NET filed a motion for a new trial on April 29, 1982. The motion did not raise the issue of whether or not there was sufficient evidence in the record to support the damages awarded for the period prior to March 8, 1978. See Appendix A attached hereto. That issue was first raised in NET's memorandum in support of the motion for new trial which was not filed until May 13, 1982. Fed.R.Civ.P. 59(b) allows 10 days after entry of judgment in which to make a motion for a new trial. Even if NET's memorandum were to be considered such a motion, it would be fatally flawed because it was not filed until 21 days after entry of judgment. Thus, NET's entire Petition is based upon a procedural rule with which it failed to comply.

#### **II. THE JUDGMENT OF THE COURT OF APPEALS IS CORRECT AND SHOULD NOT BE REVIEWED.**

The verdict of the jury pertaining to the period before March 8, 1978, was supported by the damage exhibit and the testimony of two experts, both of whom were fully qualified as experts and intimately knowledgeable about Edwards's financial condition and operating capacity. In addition, the award was supported by NET documents concerning allocations and another dealer's sales testimony. Yet, NET, in an attempt to

shift the focus away from its failure to do anything at trial, continually refers to only the damage report when it discusses evidence supporting the award.

This Court has ruled that a corporate plaintiff may prove its damages through the testimony of a corporate officer. *Story Parchment Co. v. Patterson Co.*, 282 U.S. 551 (1931). At trial herein, not only did a corporate officer testify for plaintiff, but an expert accountant did as well. In addition, documents from NET and testimony from another dealer were introduced in support of the damage claim. The Court of Appeals, in assessing all the evidence, correctly ruled that the verdict was supported by the evidence. The court specifically held at page 10a (Pet. App. 10a) that where an expert presents an assumption to a jury without objection from the opposing party, that assumption may be accepted by the jury in assessing damages. This is especially true where the opposing party chose only to cross-examine the expert and failed to present any evidence of its own. The holding is consistent with prior decisions of other courts. *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566 (6th Cir. 1981); *Marquis v. Chrysler Corp.*, 577 F.2d 624, 638-39 (9th Cir. 1978); *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 566-67 (2d Cir. 1970); NET's failure to object to the evidence offered by Edwards now bars NET from claiming the evidence is inadmissible. Since the evidence was properly admitted and two courts have held it to be sufficient to support the award of damages, NET cannot claim any prejudice. *Service Auto Supply Co. of Puerto Rico v. Harte & Co.*, 533 F.2d 23, n.3, 28 (1st Cir. 1976).

### III. THE PENDING ACTION HAS NO SIGNIFICANCE BEYOND AN ADJUDICATION OF THE DISPUTE BETWEEN THE PARTIES.

#### A. *There Is No Conflict Among the Holdings of Other Courts of Appeal.*

NET claims the Court of Appeals ruled that failure to object to evidence at trial bars motions for new trials based on insufficiency of supporting evidence. That is incorrect. The court

merely held that evidence was admitted into the record without objection from NET. Given that evidence was properly admitted, the resulting jury award was not beyond the pale of sane judgment and therefore the award was upheld. *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 880 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). The court below merely applied the usual rule in deciding, on appeal, the question of sufficiency of the evidence. What the court also did was point out that the evidence supporting the award was in the record *because* NET failed to object. Although NET may find that embarrassing, it is certainly no reason for this Court to depart from accepted principles of procedure.

Not one of the cases cited by NET as conflicting with the judgment herein is relevant to the issue presented below or the decision of the Court of Appeals. NET cited numerous cases as support for various general propositions of law, but the holdings of only two of the cases cited could, even applying NET's creative interpretations, be arguably inconsistent with the holding of the Court of Appeals below. A quick review, however, demonstrates the holdings are not inconsistent. In the first case, *Springfield Crusher, Inc. v. Transcontinental Ins. Co.*, 372 F.2d 125 (3rd Cir. 1967) the Court of Appeals for the Third Circuit ordered a new trial because the jury award was not in accord with the evidence. In addition, that court said, at page 127, that certain evidence offered by plaintiff and not objected to by defendant should not be admitted at the new trial because it was plainly *irrelevant* and *inadmissible*. That, NET claims, is a holding opposite to the decision here in the court below that the evidence was clearly *relevant* and *admissible* and was sufficient to support the jury award. Clearly, the two cases involve different factual circumstances. Indeed, the only similarity between the two cases is the inaction of the defendants. The evidence in this case was relevant and admissible and therefore completely different in nature from the evidence in the *Springfield* case.

The second case cited by NET is *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982). In that case, the Court of Appeals for the Second Circuit upheld a trial court's reversal of a jury verdict in favor of plaintiff on the grounds the evidence of damages was insufficient. Both the plaintiff and the defendant had introduced damage theories estimating how many machines plaintiff would have sold but for defendant's acts. The trial court rejected both theories as impossible in view of the uncontroverted testimony on sales. In this case, in an inept analogy to the *SCM v. Xerox* holding, NET claims that "uncontroverted" evidence similarly conflicts with the damage report offered by Edwards at trial. NET has, however, made this argument before, and has failed to persuade anyone of its soundness. Neither the jury, the trial court, nor the Court of Appeals for the First Circuit agreed. The evidence herein was admissible, did not conflict with the award and, in fact, fully justified it. Thus, the *SCM* case, *supra*, is not applicable.

*B. This Court Has Previously Held That It Would Not Review Factual Findings Affirmed by Two Lower Courts.*

This Court has held that it will not normally overturn factual determinations found by a trial court and upheld by a court of appeals. In *Comstock v. Group of Investors*, 335 U.S. 211 (1947), this Court stated at p. 214:

A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error.

In the present action, there has been no showing of error whatsoever, let alone an exceptional showing. Therefore, the opinion of the court of appeals should not be reviewed. *Neil v. Biggers*, 409 U.S. 188 (1972) at p. 193, n.3, 202, 203.

**Conclusion**

For the foregoing reasons, the Petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF NEW HAMPSHIRE

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Civil Action No. 78-49-D

JAY EDWARDS, INC.,  
PLAINTIFF

v.

NEW ENGLAND TOYOTA DISTRIBUTOR, INC., ET AL.,  
DEFENDANTS

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MOTION FOR NEW TRIAL

The defendant New England Toyota Distributor, Inc. hereby requests—pursuant to the provisions of Federal Rules of Civil Procedure, Rule 59—that the judgment entered in this proceeding on April 22, 1982 be set aside and that a new trial be granted for the reasons set forth below.

1.) The jury was not warranted in finding that the defendant New England Toyota Distributor, Inc. (hereinafter, "NET") proximately caused the plaintiff's damages subsequent to a date on or about June 8, 1978, since a new distributor had succeeded NET; the new distributor had had sufficient time in which to re-determine the plaintiff's "travel rate;" and the new distributor failed and/or refused to alter plaintiff's allegedly arbitrary allocations. Accordingly, any damages incurred by the plaintiff on or after the above date were proximately caused by the new distributor and are not attributable to the actions of NET.

2.) The court erroneously excluded documentary evidence of sales during the years 1976 and 1977 made by the plaintiff and by the alleged competing dealer Bill Dube, Inc. on the principal ground that the documents in question had not been

disclosed by the defendant during discovery. See Defendants' Exhibits GGGG and HHHH for identification. Since the evidence clearly established that sales were the most significant factor in determining allocations, and since the excluded documents indicated that the sales comparisons favored Bill Dube, Inc., the defendant was deprived of an opportunity to present persuasive evidence that the more generous allocations awarded to Bill Dube, Inc. were justified.

3.) The court erroneously excluded testimony by the witness Benson M. DeWitt regarding a telephone conversation with one Joseph DeHart, in which the said DeHart described a meeting attended by the New Hampshire Attorney General. The out-of-court statements of DeHart were offered not for the truth of their contents, but for the purpose of showing certain information regarding the concluding of the Attorney General's investigation of the plaintiff which had been given to NET. Such evidence would have warranted a finding that NET's reference to the subject matter of the investigation in the termination letter of June 15, 1977 was not made in bad faith, and the defendant was materially prejudiced by its exclusion.

4.) The Court erroneously admitted irrelevant and highly prejudicial documentary evidence which contained references to the criminal conviction of a brother of George A. Butler, the principal shareholder and chief executive officer of the defendant NET.

5.) The Court erroneously admitted certain documentary exhibits—including, but not limited to, a so-called "Image Survey" of the plaintiff (Plaintiff's Exhibit 372) and certain correspondence from non-parties—on the ground that they were governed by the "business records" exception to the hearsay rule without making the findings required by Federal Rules of Evidence, Rule 803(6), and the defendant NET was materially prejudiced thereby.

The defendant New England Toyota Distributor, Inc. will file a memorandum in support of this motion within ten days after the filing of a written objection by the plaintiff in accordance with Local Rule 11(b)(2).

WHEREFORE, the defendant New England Toyota Distributor, Inc. respectfully requests the following:

1.) That this Court set aside the judgment entered on April 22, 1982 and grant a new trial upon Count V of the complaint.

2.) That, in the alternative (and without waiver by the defendant of its prayer set forth in item # 1), this Court set aside the judgment entered on April 22, 1982 and grant a new trial upon Count V of the complaint, with such new trial to be limited to the subject of damages.

3.) That, in the alternative (and without waiver by the defendant of its prayer set forth in item # 1), this Court set aside the judgment entered on April 22, 1982; set aside that portion of the jury verdict which represents damages incurred by the plaintiff subsequent to June 8, 1978; and enter judgment for the plaintiff in the remaining amount.

4.) That this Court grant whatever additional or alternative relief it considers appropriate under the circumstances.

NEW ENGLAND TOYOTA DISTRIBUTOR, INC.

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**APPENDIX B**

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**

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Civil Action No. 78-49-D

**JAY EDWARDS, INC.,  
PLAINTIFF**

**v.**

**NEW ENGLAND TOYOTA DISTRIBUTOR, INC., ET AL.,  
DEFENDANTS**

---

**DEFENDANT'S NOTICE OF APPEAL**

Notice is hereby given that New England Toyota Distributor, Inc., a defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the First Circuit from the final judgment entered in this action on the twenty-second day of April, 1982 (plaintiff's motion to amend the judgment having been acted upon by the trial judge on the second day of June, 1982).

**NEW ENGLAND TOYOTA DISTRIBUTOR, INC.**

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